87-1386

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1987 TERM

MITCHELL B. JURISICH
Petitioner

VERSUS

THE LOUISIANA DEPARTMENT OF
WILDLIFE AND FISHERIES
Respondent

ROBERT BURAS, RENEE BURAS & ANTHONY KEKO
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
FOURTH CIRCUIT COURT OF APPEAL
OF THE STATE OF LOUISIANA

PETITION OF MITCHELL B. JURISICH

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an unwritten rule that affects the rights of citizens of the state to leasehold interest in state owned lands and water bottoms can be enforced by a subdivision of the state in an arbitrary and capricious manner without doing substantial violence to the constitutional guarantees of due process and equal protection? (Emphasis added)

2. Does the enforcement of an unwritten rule that restricts an applicant for a lease of water bottoms for oyster purposes to "ten percent 10%" of the number of acres stated in the application, only if there are subsequent applicants for acreage in the same area, but allows the subsequent applicant unlimited acreage because there are no competing applications, violate the Due Process and Equal Protection Clauses of the United States Constitution?

DESCRIPTION OF THE PARTIES

This case has its origin in a Petition for Writ of Mandamus filed on August 27, 1981 by MITCHELL B. JURISICH (hereinafter referred to as "Jurisich") seeking an order of the Court to the LOUISIANA DEPARTMENT OF WILD LIFE AND FISHERIES (hereinafter referred to as the "Department") to issue a Lease of Water-bottoms for Oyster Purposes (hereinafter referred to as a "lease"). The Department initially responded with an Exceptions Objecting to Summary Process, Prematurity and No Cause of Action. Those exceptions were dismissed with prejudice by the Department on the day that they were to be heard, September 17, 1982. Unfortunately, there was no minute entry made of that action by the Department.

On August 10, 1982 ROBERT BURAS, RENNIE BURAS AND ANTHONY KEKO (hereinaft-

er referred to as "Intervenors") filed an intervention. Jurisich responded with an Exception of No Right or Cause of Action and added a Reconventional Demand against the Intervenors. Intervenors filed an Exception of No Right or Cause of Action to the Reconventional Demand and then amended and supplemented their original petition of intervention to make a demand for damages which was dismissed before trial. The entire matter was eventually submitted to the Court on the Basis of evidence stipulated by the parties, Request for Admissions submitted by Jurisich to the Department and its Responses thereto, and the video depositions of witnesses including Jurisich, Intervenors, and representatives of the Department.

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AUTHORITIES CITED

Rule of the Supreme Court of the United States, Rule 17

United States Code Title 28, Section 2101

Louisiana Revised Statutes 56:424

Louisiana Code of Civil Procedure, Article 3861-3863

Louisiana Revised Statutes 49:951

Louisiana Revised Statutes 56:425

1974 Louisiana Constitution, Article 1, Section 3.

United States Constitution, Fifth and Fourteenth Amendments

Sibley vs. Board of Supervisors, 477 So.2d 1094

Louisiana Revised Statute 49:951

ACTIONS BY THE COURTS

On April 1, 1986 Hon. Richard J. Ganucheau rendered judgment in favor of Jurisich ordering the Department "to issue to plaintiff Mitchell B. Jurisich a lease pursuant to his application with the defendant on February 10, 1977; that any lease issued by the defendant on the acreage applied for by plaintiff's application of February 10, 1977 subsequent to that date be, and the same are hereby cancelled and annulled; and **dismissing the claims of Intervenors**." (Emphasis added)

Intervenors appealed to the Fourth Circuit of Court of Appeal and the Court reversed. On May 12, 1987 the Court of Appeal rendered judgment affirming in part and reversing in part and remanding. On May 25, 1987 Jurisich applied for rehearing and on June 17, 1987 rehearing was denied.

Jurisich petitioned the Supreme Court of Louisiana for a writ of certiorari that was denied on October 9, 1987 and rehearing denied on November 6, 1987.

STATEMENT OF JURISDICTION

Jurisdiction of the United States Supreme Court to issue a writ of certiorari or review to bring before it a judgment or decree of a state court of last resort that has ruled on a federal question is established in Rule 17 of the Rules of the Supreme Court of the United States and Title 28, Section 2101 of the United States Code.

JUDGEMENT TO BE REVIEWED

Jurisich seeks a review of the decision of the Fourth Circuit Court of Appeal for the State of Louisiana dated May 12, 1987 to the extent that said decision failed to find that the unwritten rule of the Department violated the Due Process and Equal Protection Clauses of the United States Constitution, and the denial of rehearing by the Fourth Circuit Court of Appeals; the denial of a writ of certiorari by the Louisiana Supreme Court dated October 9, 1987; and the denial of a request for rehearing by the Louisiana Supreme Court dated November 6, 1987.

STATEMENT OF FACTS

Jurisich is a professional oyster fisherman. He is a second generation oyster fisherman who is very knowledgable about the development and production of oysters. Prior to 1977 he noticed an area of water bottoms that had the potential to develop into a very productive oyster lease. On February 10, 1977 he filed Application No. AA-413 on a form supplied by the Department for a lease of "60 acres, more or less." (Emphasis added) The area described in Application AA-413 contained in excess of 1,000 acres.

Eventually, Intervenors recognized the wisdom of Jurisich's actions and they also filed applications in the same area. When Jurisich surveyed the area to be included in his lease, he decided to take "more" than the 60 acres. In fact, he surveyed an area that turned out to be

210 acres. When he submitted his survey and requested his lease, the Department refused claiming the existence of a "Ten Percent Rule". When challenged to produce the so-called "Ten Percent Rule" the Department was forced to admit that there was no written rule and that no such rule had ever been properly adopted by the Department or enacted by the legislature. Nevertheless, the Department insisted on its position and refused to issue a lease to Jurisich for the acreage included in the survey he submitted. Jurisich filed the Petition for a Writ of Mandamus and the legal processes described in the Statement of the Case ensued.

The evidence and testimony reveals some very significant facts that are important to a full understanding of the correctness of Judge Ganucheau's decision and judgment.

The application form that the Department requires of an applicant for a lease is a creation of the Department and contains no reference to a "Ten Percent Rule", namely, that an applicant can only survey and receive a lease for Ten Percent (10%) in excess of the amount of the acreage stated in the application just before the printed language on the form that states "more or less" (Plaintiff's Exhibit No. 1).

Lease Application bearing number AA-413 (Plaintiff's Exhibit No. 1) was signed by Mr. Jurisich after certain entries, including the amount of acreage and the description of the area, were made by an unidentified employee of the Department (Jurisich Deposition p. 7). There was a difference of opinion about the meaning of the handwritten description on Application AA-413, namely, "E. of Bastian Bay" (Anderson Deposition pp.

21-2). If that language in the hand-written description on Application AA-413 means that the area described includes all areas East of the shore of Bastian Bay, then the area of the description is in excess of 1,000 acres. (Anderson Deposition pp. 24-25).

At the time Jurisich filed Application No. AA-413 there was no "Ten Percent Rule" written down anywhere in the Department's records or archives. No such rule had ever been promulgated. It only existed in the mind of employees of the Department. (Schafer Deposition pp. 21-23). Schafer, the then Chief of the Seafood Division did not even know how he came to learn of the "Ten Percent Rule".

The "Ten Percent Rule" as understood by Schafer provided:

> "That if an applicant had an application in an area and

there were other applications in the same area, that first applicant would be limited to 10 percent (10%) of the acreage he had on his application" (Schafer Deposition p. 22).

The "Ten Percent Rule" had some "Variations". If no one else filed an application covering the same area, before a lease was issued, an applicant could take up to 1,000 acres. However, if a person applied for "100 acres" in an area described in an application that included more than 1,000 acres, but someone does file an application in the same area for "100 acres", the first applicant for "100 acres" would be restricted to 110 acres and the second applicant could take 890 acres (Schafer Deposition pp. 23-24).

ARGUMENT

MAY IT PLEASE THE COURT:

The law in effect at the time this suit was filed by Jurisich is found in Louisiana Revised Statutes 56:424:

> "No claim to any water bottoms suitable for oyster culture by an person shall be valid or have any effect until adjudicated upon by a court of competent jurisdiction in a suit between the state and the claimant, the claimant by virtue hereof may institute suit against the state in any court of competent jurisdiction for the legal determination of the validity of his claims, without the necessity of a special legislative act authorizing suit."

Jurisich had complied with all of

the requirements necessary for the issuance of a lease pursuant to Application No. AA-413. The only obstacle to the issuance of the lease was the spurious "Ten Percent Rule" of unknown origin. (See language cited from Defendants' Exhibit No. 1 by appellants at p. 4 of brief.) The Department refused to issue a lease for the amount of acreage contained in the survey submitted by Jurisich. Without a lease Jurisich was unable to fish the area, the and delay translated into loss of income of a substantial amount. The Louisiana Code of Civil Procedure provided a vehicle for such a situation at Articles 3861-3863.

Article 3861 states:

> "Mandamus is a writ directing a public officer or a corporation or an officer thereof to perform any of the duties set forth in

Articles 3863 and 3864."

Article 3862 states, in part:

"A writ of mandamus may be issued in all cases where the law provides no relief by ordinary means or where the delay involved in obtaining ordinary relief may cause injustice. . . ."

Article 3863 states, in part:

"A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law . . ." (Emphasis added)

The only remedy available to Jurisich on August 27, 1981 was a petition for a writ of mandamus. Obviously, Jurisich did not succeed in preventing the delays that have cost him substantial financial losses, but he did succeed in obtaining a writ of mandamus

directed to a public officer to compel the performance of his ministerial duty. In fact, the only other choice available to Jurisich was to abandon his rights and submit to the illegal demands of the Department.

The demand of the Department that Jurisich reduce the amount of acreage in his survey was illegal because it was based upon a spurious rule of unknown origin that had never been formally adopted by the Department and was not even in written form. The so-called "Ten Percent Rule" allegedly provided that a person who applied for a lease would be limited to ten percent (10%) in excess of the amount of acreage stated in the application, if there were later applications in the same area; however, if no other person applied for a lease in the same area, the applicant could take up to the full acreage that any person can

hold.

The so-called "Ten Percent Rule", when applied, creates grossly inequitable situations admitted by Schafer and described in the Statement of Facts. Specifically, a person who discovers an area that is suitable for production of oysters and makes an application for an oyster lease would be limited to a lease for ten percent (10%) in excess of the "number" of acres stated in the application, regardless of the number of acres in the "area" described in the application. Then, a person who knows that the first applicant is very good at locating productive oyster areas can file an application for a lease in the same area and limit the first applicant to ten percent (10%) of the "number" stated in his or her application, and then take the rest of the acreage in the area.

The so-called "Ten Percent Rule"

ignores the clear language of the application which contains the words "more or less", immediately following the space in the application where the "number" of acres is inserted. The application form is a creation of the Department. It makes no reference to a "Ten Percent Rule". There is no written statement of the so-called "Ten Percent Rule" provided to an applicant when application is made.

The Court of Appeal dismissed the "Ten Percent Rule" as an interpretive function of the Department. In fact, there was no "rule" to interpret. There was not even the hint of an attempt to comply with the requirements of the Administrative Procedures Act that governs the adoption of such rules. If such a "rule" did exist, it was not consistently followed by the Department. The facts in this case reveal that the

Department refused to issue a lease to Jurisich for 209 acres because of an alleged "Ten Percent Rule", and the existence of applications filed after AA-413, the Department did issue leases pursuant some applications filed after AA-413, and some of those leases were for more that ten percent (10%) in excess of the number of acres stated in those applications (Schafer Deposition pp. 48-50 and Plaintiff's Exhibit 16). This was all done after the suit by Mr. Jurisich that is the basis of this litigation and within the area covered by the description in AA-413.

Each of the applications of the three Intervenors called for "50 acres, more or less." If the Department had issued a lease to Jurisich for 209 acres pursuant to Application AA-413, as he originally requested, there would have been sufficient acreage left in the area

described in Application AA-413 to issue leases to all three Intervenors for as much as five times the amount of acreage stated in their Applications (Plaintiff's Exhibits 20, 21, & 23).

Intervenors have yet to submit a survey to the Department. In fact, Intervenors have not complied with any of the statutory requirements necessary for the issuance of a lease. Intervenors argue that the acreage they intended to survey is included in the 209 acres surveyed by Jurisich.

The actions of the Department in attempting to enforce an unwritten and unpromulgated rule that contradicted the clear language of the application forms created and supplied by the Department was not simply a "ministerial act." (Emphasis added)

In fact, the Department was trying to usurp the functions of the state

legislature and/or avoid the requirements imposed upon subdivision of the State of Louisiana by the Administrative Procedures Act found at LSA-R.S. 49:951, et seq.

The decision of the Fourth Circuit Court of Appeal grants to the Department nothing less than "dictatorial discretion" in interpreting the language of LSA-R.S. 56:425. Certainly, the Department has some discretionary powers, but the constitutional requirements of due process and equal protection clearly limits those powers and prohibit the Department from enforcing unwritten rules that have no basis in a deliberative or legislative process.

The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution require that any law or state action that purports to affect the property

rights of individuals or in some way classifies individuals in such a manner that one class is preferred over another must stand the test of some deliberative process. At a minimum, such a law should be written down. Jurisich not only proved that the State had no reasonable interest or basis for the creation of the so-called "Ten Percent Rule", but proved that there was no basis for such a "rule". Any such "rule" was clearly prejudicial as stated and as applied. Frankly, if the "rule" had been formally adopted, it would have been unconstitutional as formulated and as applied. Sibley v. Bd. of Supervisors of Louisiana State University, 477 So.2d 1094, 1107, 1108.

It is difficult to conceive of an orderly and just society that could long endure under the yoke of a rule-making system such as that used by the Depart-

ment to create the spurious "Ten Percent Rule". No one knows where it came from. No one knows how long it has been in existence. It was never written down. It was never promulgated. It seems to have been applied only when some employee in the Department decided to. It apparently has some exceptions that are occasionally invoked.

The legislature obviously intended the Administrative Procedures Act, supra. to put an end to such gestapo tactics. It is not too much to ask of a subdivision of the state that it write down the rules it wants the public to comply with, and to promulgate such rules so that the public will know what is expected of them. The administration of the state's natural resources is a very important function and it should not be done by ambush and surprise.

However, Intervenors were unable to

cite anything in the statutory law that limit an applicant to a lease for only the "number" of acres inserted in the space just prior to the words, "more or less," on the application form required by the Department. Quite the contrary is true. The law cited above provides an applicant with certain leeway in describing the acreage desired. The legislature apparently recognized that it is impractical and unwise to insist upon exactitude in an application process that involves the estimation of areas over open water.

All of this unhappy business and litigation could have been prevented. If the Department truly believed in the value of the so-called "Ten Percent Rule", it could have acted to properly adopt such a rule or seek statutory enactment of a law to that effect. Such a law was enacted after Jurisich initia-

ted this litigation, however, it appears to be an unwise and unnecessary law. estimate and measure. In apparent recognition of this fact, the Department routinely issued leases for substantially more than the numerical description in the application.

The trial court correctly concluded that the ". . . department 'rule' or 'regulation' was not properly adopted in compliance with the statute. . ." (Administrative Procedures Act, LSA-RS 49:951) However, the court clearly overlooked the fact established in the evidence that the Department issued a lease to one of the intervenors in this litigation for 454 acres on the basis of a numerical description in his application of 150 acres (Emphasis added.) The only difference in the two cases was the so-called "Ten Percent Rule". The lease to intervenor was not an isolated case.

The Department did not consider itself bound by the "Ten Percent Rule" whenever it arbitrarily chose not to.

In the absence of a "Ten Percent Rule" Jurisich should be treated like any other applicant for water bottoms for oyster purposes and he should be allowed to survey and obtain a lease for as much as he would like, up to the 1,000 acre individual limitation, within the area of the verbal description.

In truth, the Department did not refer to the numerical description in an application unless it attempting to arbitrarily impose the "Ten Percent Rule", which the court has correctly concluded was not properly adopted.

The Court's decision accomplishes for the Department what it tried to do in the first instance - restrict Jurisich to a certain number of acres for a lease while retaining the right to grant

unlimited acres to other applicants.

The Court's decision may "save face" for the Department and cover up its gross incompetence and mismanagement in the leasing of the water bottoms of the State of Louisiana for oyster purposes, but it will also send a message to the Department and to all other departments and subdivision of the State of Louisiana that they can act in a totally arbitrary manner without fear of correction by the courts of this State. Jurisich may lose the right to lease some acres water bottoms for oyster purposes, but the people of Louisiana will have lost a great deal more - the protection of law and the assurance that the courts will require that laws be properly adopted before they are imposed on the people of the state.

There is a clear injustice in the court's decision. The facts clearly

establish that Jurisich was the first applicant in the area in dispute. The three intervenors are individuals who regularly observe where Jurisich applies for oyster leases and then file applications in the same area. Intervenors' actions indicate either their acknowledgement that Jurisich has a superior ability to select areas suitable for oyster growth or that they simply wish to harass Jurisich. In all probability both conclusions would be correct.

In the present case, Intervenors each filed applications of 50 acres subsequent to Jurisich's application of 60 acres. Under the court's ruling Jurisich would be limited to 66 acres in the lease pursuant to his application AA-413. Presumably, the next two applicants would each be limited to 55 acres (50 + 10%). The third applicant would be entitled to the balance of the

acreage in the description of the area, and that amounts to more than 1,000 acres.

Jurisich is not even able to file an application for the remaining area because of a moratorium on applications for leases of water bottoms for oyster purposes.

Clearly, the judgment of the trial court was correct and should be affirmed and re-instated and the decision of the Fourth Circuit Court of Appeal, to the extent that reversed the trial court judgment should be reversed.

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